MOHD NAJIB HJ ABD RAZAK v. PP

HIGH COURT MALAYA, KUALA LUMPUR
COLLIN LAWRENCE SEQUERAH J
[CRIMINAL APPLICATION NO: WA-44-211-12-2018]
1 MARCH 2019

LEGAL PROFESSION: *Practice of law – Practice and etiquette – Application to disqualify Prosecutor from continuing to act as Senior Deputy Public Prosecutor or to appear on behalf of Public Prosecutor – Appointment of Prosecutor made known through media release – Whether made under provisions of s. 376(3) Criminal Procedure Code – Whether letter of appointment ought to be produced – Whether applicant had right to request for copy of letter of appointment – Whether letter of appointment classified as official secret under Official Secrets Act 1972 – Whether Prosecutor involved in investigations of cases – Whether there was breach of r. 28(1) of Legal Profession (Practice and Etiquette) Rules 1970 – Whether applicant's apprehension or fears of overzealous prosecution based upon mere speculation and unfounded – Whether threshold for disqualification of Prosecutor met*

CRIMINAL PROCEDURE: *Prosecution – Prosecuting officer – Application to disqualify Prosecutor from continuing to act as Senior Deputy Public Prosecutor or to appear on behalf of Public Prosecutor – Appointment of Prosecutor made known through media release – Whether made under provisions of s. 376(3) Criminal Procedure Code – Whether letter of appointment ought to be produced – Whether applicant had right to request for copy of letter of appointment – Whether letter of appointment classified as official secret under Official Secrets Act 1972 – Whether Prosecutor involved in investigations of cases – Whether there was breach of r.28(1) of Legal Profession (Practice and Etiquette) Rules 1970 – Whether applicant's apprehension or fears of overzealous prosecution based upon mere speculation and unfounded – Whether threshold for disqualification of Prosecutor met*

By way of a notice of motion ('NOM'), the applicant sought to disqualify Dato Seri Gopal Sri Ram ('GSR') from continuing to act as a prosecutor in the following criminal cases (i) WA-45-7-11-2018 and WA-45-8-11-2018 ('the 1MDB case'), (ii) WA-45-10-12-2018 ('the MOF case'); and (iii) WA-61R-26-12-2018 ('the PAC case') ('the cases'). The applicant was charged at the Sessions Court with 21 charges for the offence under s. 4(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLA') and four charges for the offence under s. 23(1) of the Malaysian Anti-Corruption Commission Act 2009 ('MACCA') on 20 September 2018 where he pleaded not guilty to all the charges. On 31 October 2018, the applicant's application under s. 417(1)(e) of the Criminal Procedure Code ('CPC') to transfer the cases from the Sessions Court to the High Court was allowed. The present application by the applicant by way of the NOM was premised by the following pertinent background facts that was submitted to

have formed the basis for the application. On 13 September 2018, criminal proceedings were commenced against the applicant's legal counsel, Tan Sri Shafee, who was charged with two charges under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 and two charges under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activity Act 2001 ('Tan Sri Shafee's case'). GSR, who purported to act as a Senior Deputy Public Prosecutor ('SDPP') under a purported authority and/or appointment granted to him by the respondent attended on behalf of the respondent as 'lead prosecutor' in Tan Sri Shafee's case. When a copy of GSR's fiat and/or instrument of appointment was requested by counsel, the assisting Deputy Public Prosecutor handed to Tan Sri Shafee's counsel an original copy of a letter of appointment executed by the respondent which purported to appoint GSR under s. 376(3) of the CPC ('letter of appointment') . The GSR was, *inter alia*, appointed to have conduct and supervision over both the investigation process by various investigation agencies and the prosecution into cases related to '1MDB.' When Tan Sri Shafee's counsel requested for a copy of the letter of appointment, he was informed to write in to the Attorney Generals Chambers for a copy which would be duly supplied. Pursuant to this, Messrs Shafee & Co, the applicant's solicitors, wrote to the respondent to request for a copy of the aforesaid letter of appointment. When the applicant was charged in the Sessions Court, GSR had attended on behalf of the respondent and claimed to have been appointed as a Deputy Public Prosecutor. The respondent, however, reneged and refused to provide and disclose to the applicant the letter of appointment. Thereafter, GSR also attended as prosecutor in the MOF case and PAC case against the applicant. The issues that arose herein were (i) whether the letter of appointment by the respondent appointing GSR as SDPP pursuant to s. 376(3) of the CPC ought to be produced; and (ii) whether GSR ought to be disqualified from continuing to act as SDPP and/or to appear on behalf of the Public Prosecutor in the cases. It was submitted by the applicant that GSR was involved in the investigations in the cases thus he could not also prosecute and that GSR had already taken a position on the culpability of the applicant.

Held (dismissing application):

(1) The appointment of GSR as a SDPP by the Public Prosecutor was made known through a media release by the Public Prosecutor dated 31 August 2018. Two facts emerged from this, firstly, it was expressly mentioned that the appointment of GSR as a SDPP was made under the provisions of s. 376(3) CPC and secondly, the appointment of GSR as SDPP was made by the Public Prosecutor personally. The Public Prosecutor's media release was *ex facie* proof of the appointment of GSR as a SDPP. (paras 42, 44 & 49)

(2) When criminal proceedings commenced against the applicant's legal counsel, Tan Sri Shafee, a copy of GSR's fiat and/or instrument of appointment was requested by counsel. On that occasion, the assisting DPP handed to Tan Sri Shafee's counsel an original copy of the letter of appointment executed by the respondent appointing GSR under s. 376(3) CPC. Subsequently, Messrs Shafee wrote two letters to the respondent which elicited the following response from the respondent that Tan Sri Shafee had no right to have a copy of the letter of appointment. By their own admission, the applicant had confirmed that they had sight of the letter of appointment during the course of previous proceedings. One aspect of the applicant having had sight of the letter of appointment and then requesting for its production by way of letters was that by conduct they had implicitly acknowledged the existence of the letter of appointment. For the applicant to now take the position that the very existence of the letter of appointment was in doubt was to allow them to approbate and to reprobate. So the applicant could not now resile from their previous position and contend that the letter of appointment did not exist. The fact of the appointment of GSR by the respondent under s. 376(3) of the CPC as reflected in the letter of appointment could not therefore be in any doubt. (paras 50-56)

(3) No less than the person of the Attorney General ('AG') himself appeared in these proceedings and said that GSR was appointed by him pursuant to s. 376(3) CPC. The appointing authority himself therefore had confirmed the appointment of GSR before this court. This court, therefore, under all the circumstances took cognisance of the fact of the said appointment. There was thus no need for the letter of appointment to be produced even for the inspection of this court because there was simply no cause or reason to doubt the existence or the legality of the appointment. In light of the fact that the legitimacy of the appointment was not in dispute and the AG had himself stated in this court that GSR was appointed pursuant to s. 376(3) CPC, it could be taken that GSR had the imprimatur of the AG to prosecute these cases. (paras 67, 68 & 75)

(4) By way of analogy to the solicitor and client privilege with regard to private practitioners contained in s. 126 of the Evidence Act 1950, the prosecution as matter of pure public policy considerations in the pursuance of their duty to prosecute crime could not be placed in a worse off position than those in private practice. The inevitable conclusion therefore was that the applicant had no right to request for a copy of the letter of appointment executed by the respondent in

A relation to the appointment of GSR as a SDPP under s. 376(3) of the CPC to be produced. Further, the letter of appointment is classified as an official secret or marked as 'RAHSIA' under the Official Secrets Act 1972, which fact was averred to by GSR affirming that his letter of appointment has been marked as 'RAHSIA'. GSR was clothed with the B necessary *locus standi* to prosecute the cases. (paras 79 & 80)

(5) Investigative powers are vested in the Royal Malaysian Police ('PDRM') in respect of offences under the Penal Code and the Malaysian Anti-Corruption Commission ('MACC') for offences involving corruption under the Malaysian Anti-Corruption Commission Act 2009. C Once these investigative agencies have concluded their investigations, then and only then will the investigation papers proceed to the Attorney General's Chambers for a decision to be taken on whether to institute charges. The role of the Deputy Public Prosecutors therefore, as the alter ego of the AG, only comes into play after the process of D investigation is completed. It was inconceivable that GSR had 'gone to the ground' so as to speak and commence the recording of statements from potential witnesses. There was no evidence that GSR was involved in the investigations of the cases. The investigations commenced in May 2018 while the appointment of GSR as SDDP was in August 2018. By then, some three months or so had elapsed. This made it highly E improbable that GSR had a hand in the investigations into the cases. Given the fact that GSR was not involved in the investigations, there was no breach of r. 28(1) of the Legal Profession (Practice and Etiquette) Rules 1970. (paras 105-111)

F **(6)** The prosecution lays itself open to the adverse inference under s. 114(g) of the Evidence Act 1950 to their own detriment should they choose not to tender a particular document or call a particular witness with the objective of suppressing evidence. So, the defence is not altogether without recourse and there are safeguards inbuilt within the scheme of the CPC coupled with the court's inherent jurisdiction which the court G can utilise to ensure a level playing field among parties. Further, a perusal of s. 376(3) of the CPC indicates that the appointed Deputy Public Prosecutors shall be under the general control and direction of the Public Prosecutor. The SDPP is not at liberty to prosecute in whatever fashion or manner they see fit untrammelled. Section 376(3) H CPC does not provide a *carte blanche* to the SDPP to do as he pleases with respect to the manner of conducting prosecutions, the AG having at all times the ultimate control. This of itself would mean that the apprehension of the applicant with regard to GSR's alleged bias and impartiality was unfounded. (paras 135-139)

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(7) It was the applicant's submission that in opposing bail, GSR had made clear insinuations that the applicant was already guilty of the offences he was charged for. This court, however, agreed that the prosecution is entitled as a matter of prosecutorial right to raise the objection as to the bail for the court's consideration as the charges were in respect of non-bailable offences. Indeed it is the duty of the prosecutor to object to bail in appropriate cases and when they do, they are entitled to raise any matters they consider relevant or bring any matter to the attention of the court which may affect the bail application. In the final analysis, bail was given subject to conditions and this was a pure exercise of the courts' discretion as opposed to anything else. GSR had not objected to the applicant's application to pay the bail amount by way of instalments. This surely did not reflect the behaviour of someone predisposed to overzealous prosecution influenced by bias. (paras 147-150)

(8) Unlike career Deputy Public Prosecutors who may well have every reason to successfully prosecute the applicant with a view to being promoted as a result, GSR had no similar interest or pecuniary interest for that matter and so could be expected to perform his duty without fear or favour. The apprehension or fears of overzealous prosecution on the part of the applicant was based upon mere speculation as opposed to actual prosecutorial misconduct. This court did not find any basis for there to arise even an appearance of bias on the part of GSR that would lead a reasonable person to conclude that the applicant would not be accorded a fair trial. The threshold for the disqualification of GSR was therefore not met. There were no grounds upon which GSR could be said to be biased or impartial in the conduct of his duty as SDPP against the applicant. (paras 154-159)

Case(s) referred to:

Ahmad Zubair Hj Murshid v. PP [2014] 9 CLJ 289 FC ***(refd)***
Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1 FC ***(refd)***
Dato Seri' Anwar Ibrahim v. PP [2014] 1 CLJ 289 FC ***(refd)***
Dato Seri' Anwar Ibrahim v. PP [2016] 6 CLJ 161 FC ***(refd)***
Food Corporation of India v. Kamdhenu Cattle Feed Industries AIR 1993 SC 1601 ***(refd)***
Grimwade v. Meagher and Ors [1995] 1 VR 446 ***(refd)***
Kallinicos v. Hunt [2005] NSWSC 1181 ***(refd)***
Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***
MG v. R [2007] NSWCCA 57 ***(refd)***
PP v. Dato Seri' Anwar Ibrahim [2014] 1 CLJ 354 CA ***(refd)***
PP v. Dato' Yap Peng [1987] 1 LNS 28 HC ***(refd)***
PP v. Datuk Harun Hj Idris & Ors [1976] 1 LNS 180 HC ***(refd)***
PP v. Lew Koy [2002] 1 CLJ 86 HC ***(refd)***

Legislation referred to:
Anti-Money Laundering and Anti-Terrorism Financing Act 2001, s. 4(1)
Courts of Judicature Act 1964, s. 22
Criminal Procedure Code, ss. 4, 51, 51A, 376(3), 379, 417(1)(e)
Evidence Act 1950, ss. 2, 114(e), (g), 126
Federal Constitution, arts. 5, 121(1), 145(3)
Legal Profession (Practice and Etiquette) Rules 1978, r. 28(a)
Malaysian Anti-Corruption Commission Act 2009, s. 23(1)
Penal Code, ss. 34, 409
Specific Relief Act 1950, ss. 41, 44

Other source(s) referred to:
16 Halsbury's Law of England, 4th edn, para 1507

For the applicant - Muhammad Shafee Abdullah, Farhan Shafee, Farhan Read, Wan Aizuddin Wan Mohammed, Rahmat Hazlan, Harvinderjit Singh, Zahria Eleena & Syahirah Hanapiah; M/s Shafee & Co
For the respondent - Tommy Thomas, Ahmad Akram Gharib, Mohamad Mustaffa P Kunyalam, Atiqah Liyana, Deepa Nair Thovaharan & Nadia Mohd Izhar; DPPs

Reported by Suhainah Wahiduddin

JUDGMENT

Collin Lawrence Sequerah J:

Introduction

[1] By way of a notice of motion ("NOM"), the applicant sought to disqualify Dato Seri Gopal Sri Ram from continuing to act as a prosecutor in the following criminal cases brought against the applicant:

(a) WA-45-7-11-2018 and WA-45-8-11-2018 ("the 1MDB case");

(b) WA-45-10-12-2018 ("the MOF case"); and

(c) WA-61R-26-12-2018 ("the PAC case").

("hereinafter referred to as the cases")

[2] Although the NOM sets out various reliefs sought for, the applicant confined himself to seeking the following reliefs:

(a) an order that the respondent do forthwith and in any event no later than three days from the date of this order, produce a copy of the letter of appointment executed by the respondent in relation to the appointment of Datuk Seri Gopal Sri Ram as a Senior Deputy Public Prosecutor purportedly under s. 376(3) of the Criminal Procedure Code; and

(b) an order that Datuk Seri Gopal Seri Ram be disqualified from continuing to act as a Senior Deputy Public Prosecutor and/or to appear on behalf of the Public Prosecutor in the 1MDB case, the MOF case and the PAC case.

Background Facts

[3] The applicant was charged at the Kuala Lumpur Sessions Court with 21 charges for the offence under s. 4(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ("AMLA") and four charges for the offence under s. 23(1) of the Malaysian Anti-Corruption Commission Act 2009 ("MACCA") on 20 September 2018 where he pleaded not guilty to all the charges.

[4] On 31 October 2018, the applicant's application under s. 417(1)(e) of the Criminal Procedure Code to transfer the cases from the Sessions Court to the High Court was allowed.

[5] The High Court has set the trial dates from 15 April 2019 to 3 May 2019.

[6] The present application by the applicant by way of the NOM is premised by the following pertinent background facts that they submit forms the basis for the application.

[7] On 13 September 2018, criminal proceedings were commenced against the applicant's legal counsel, Tan Sri Shafee, *vide* Kuala Lumpur Sessions Court Arrest Case No. WA-62R-43-09-2018, whereby the applicant's counsel was charged with two charges Under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 and two charges under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activity Act 2001 ("Tan Sri Shafee's case").

[8] Gopal Sri Ram ("GSR") who purported to act as a Senior Deputy Public Prosecutor ("SDPP") under a purported authority and/or appointment granted to him by the respondent attended on behalf of the respondent as 'lead prosecutor' in Tan Sri Shafee's case.

[9] When a copy of GSR's fiat and/or instrument of appointment was requested by counsel, the assisting Deputy Public Prosecutor, Ahmad Akram Gharib, handed to Tan Sri Shafee's counsel an original copy of a letter of appointment dated on or about 30 August 2018 executed by the respondent which purported to appoint GSR under s. 376(3) of the Criminal Procedure Code ("letter of appointment"). The letter of appointment alluded to *inter alia* the following:

(a) that GSR was appointed to have conduct and supervision over both the investigation process by various investigation agencies and the prosecution into cases related to '1MDB';

(b) that GSR was appointed whilst retaining his private practice as an advocate and solicitor of the High Court of Malaya;

A (c) that GSR's appointment was subject to the practice and etiquette rules under the Legal Profession (Practice & Etiquette) Rules 1978 and under the Legal Profession Act 1976;

(d) that GSR was to 'scrupulously avoid' any situation of conflict between his alleged appointment and his past, present and future engagements as an advocate.

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[10] When Tan Sri Shafee's counsel requested for a copy of the letter of appointment, counsel was informed by Ahmad Akram Gharib to write in to the Attorney General's Chambers for a copy which would be duly supplied.

C **[11]** However, GSR and/or the other Deputy Public Prosecutor did not produce to the Honourable Court, the letter of appointment or any other written authorisation from the respondent authorising GSR to appear on behalf of the respondent and to have conduct of the prosecution.

[12] Pursuant to the conversation between counsel and the Deputy Public D Prosecutor above-mentioned, *vide* a letter dated 18 September 2018, Messrs Shafee & Co (who are also the applicant's solicitors) wrote to the respondent to request for a copy of the aforesaid letter of appointment.

[13] On 20 September 2018, when the applicant was charged in the Sessions Court in Kuala Lumpur with four charges under s. 23 of the E MACCA 2009 and 21 charges under s. 4(1) of the AMLA ("the IMDB case"), GSR attended on behalf of the respondent and claimed to have been appointed as a Deputy Public Prosecutor. The following exchange took place before the Sessions Court whereby GSR undertook to produce the letter of appointment:

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MSA: Yang Arif, just before we begin, I would like to make it clear that we have not got a copy of the authority under which my learned friend, Datuk Seri Sri Ram, is acting as the Timbalan Pendakwa Raya. We have written and we have asked on a previous occasion in another case but until today we have not been provided so. And this is contrary to the usual practice. In fact it has happened G before where at the first instance of the Court appearance, a DPP who is absorbed from the private practice in fact tenders – this is the authority I'm acting upon – and until today we haven't got it. Despite of persistent requests.

H GSR: Indeed we'll give. We'll give.

[14] As Messrs Shafee & Co's letter dated 18 September 2018 had not been responded to, a follow-up letter dated 26 September 2018 was also sent to the respondent by Messrs Shafee & Co.

I

[15] The respondent *vide* a letter dated 1 October 2018 reneged and refused to provide and disclose to the applicant the said letter of appointment. The grounds for this refusal as recorded in that letter were as follows:

> 2. In the Malaysian adversarial system, Tan Sri Muhammad Shafee bin Md. Abdullah ("the Accused") has no right to have a copy of the letter of appointment that the Public Prosecutor issued to Datuk Seri Gopal Sri Ram to lead the prosecution against the Accused.
>
> 3. In any event, the fact of its existence cannot be in doubt since it was shown to counsel for the Accused as stated in your letter dated 26 September 2018.

[16] Thereafter, GSR also attended as prosecutor in the following other cases brought against the applicant:

(a) On 25 October 2018, in the MOF case, the applicant and the former Treasury Secretary General, Tan Sri Dr Mohd Irwan Serigar Abdullah were jointly charged with six charges under s. 409 of the Penal Code read together with s. 34 of the Penal Code; and

(b) On 12 December 2018 in the PAC case the applicant was faced with a further charge under s. 23 of the Malaysian Anti-Corruption Commission Act 2009.

Preliminary Objection

[17] Before addressing the merits of the application, it is first necessary to deal with the preliminary objections ("PO") raised by the respondent.

[18] Firstly, the respondent objected to the filing of the affidavit of the applicant No. 2 ("encl. 18") which they say was filed after parties had exchanged submissions and that the contents of the affidavit touched on matters raised in the submission. The respondent said that this deprived them of the opportunity to reply at this late hour. It was asked therefore that the court ignore the said affidavit.

[19] Learned counsel for the applicant replied that they received instructions very late in the day to prepare a reply to encl. 18 on a material issue which related to GSR's involvement in the investigations and it was on that premise that encl. 18 was filed.

[20] He also said that while this may have resulted in some inconvenience, it was not a good reason to prevent such an affidavit being filed as the purpose of the proceedings was to discover the truth.

[21] Upon a question posed by the court, the learned Deputy Public Prosecutor, Tuan Akram bin Gahrib in his usual forthright and candid manner, conceded that the respondent would not be prejudiced in arguing the matter.

[22] For that reason, I found no merit in the argument raised by the respondent and resolved the matter in the applicant's favour resulting in the said affidavit standing as duly and properly filed in these proceedings.

[23] Next, the respondent submitted that the intitulements in nos. 2, 3 and 5 of the NOM referred to cases which are not before this court. While intitulement no.2 referring to Case No: WA 45-10-12-2018 is in Court No. 2, the intitulement in no. 3 referred to a case still pending before the Sessions Court. It was thus submitted that this court has no control over these cases.

[24] However, a perusal of the NOM and the intitulements will reveal that it makes reference to both case numbers WA-45-7-11-2018 and WA-45-8-11-2018 which are matters registered in this court. I do not, for that reason, find that this deprives the court of jurisdiction to hear this application nor was it a good enough reason to strike out the application.

[25] The respondent then raised the issue that intitulement no. 9 made reference to ss. 41 and 44 of the Specific Relief Act 1950 which was civil in nature. As the current proceedings are filed in a criminal court, this court had no jurisdiction to make any declaratory orders.

[26] It was further submitted that the source of the appointment of GSR as SDPP is pursuant to s. 376(3) of the Criminal Procedure Code ("CPC") and unlike the position in India, this is a specific provision resulting in this court not having jurisdiction to entertain this application.

[27] This argument however fails to take into account the fact that the court has inherent powers to control proceedings including the right of counsel to appear before it as will become apparent later in the course of this judgment.

[28] In any event, the applicant submitted that they are not challenging the justiciability of the Attorney General ("AG") to appoint under s. 376(3) of the CPC.

[29] The other fact to take into account is that there are other intitulements made in the NOM which this court can legitimately consider. I found no merit therefore in the submission of the respondent on this point.

[30] The respondent then raised the issue that although all references made in encl. 2 which is the affidavit in support by the applicant affirmed on 20 December 2018 are in respect of the first respondent, paras. 47(b), 53, 54(a) and 58 refer to the second respondent. There is however only one respondent here.

[31] It was therefore contended that the NOM and the affidavit in support are bad and defective and it was submitted that the motion ought to be dismissed *in limine*.

[32] With regard to this objection, I find that they amount to no more than technical objections and do not occasion any prejudice or cause any manner of confusion to the respondent. It is therefore curable.

[33] I also agree with learned counsel for the applicant that preliminary objections of this nature have now been consigned to the dustbin of antiquity.

[34] In the premises, I found no merit in all the POs raised by the respondent and I accordingly dismissed all of them.

Analysis And Findings

[35] Based upon the written submissions and oral arguments canvassed, the following issues arise for consideration:

(i) Whether the letter of appointment by the respondent appointing Gopal Sri Ram ("GSR") as Senior Deputy Public Prosecutor ("SDPP") pursuant to s. 376(3) of the Criminal Procedure Code ("CPC") ought to be produced; and

(ii) Whether GSR ought to be disqualified from continuing to act as SDPP and/or to appear on behalf of the Public Prosecutor in the cases.

These will be dealt with in turn.

(i) Whether The Letter Of Appointment ("LOA") By The Respondent Appointing Gopal Sri Ram ("GSR") As Senior Deputy Public Prosecutor ("SDPP") Pursuant To s. 376(3) Of The Criminal Procedure Code ("CPC") Ought To Be Produced

[36] The applicant took the stand that the matter of the justiciability of the AG to appoint persons under s. 376(3) of the CPC is not relevant to this application. This is a matter which they said they have raised in judicial review proceedings before another High Court.

[37] The challenge taken therefore was initially thought to have been with respect to the existence of the said LOA. Such an indication was also made manifest in the written submissions of the applicant which alluded to GSR attending on behalf of the respondent on 20 September 2018 during the 1MDB case at the Sessions Court where he claimed to have been appointed as a Deputy Public Prosecutor.

[38] Further, the applicant submitted in the same vein that should it transpire that GSR did not in fact have the requisite written authorisation by the respondent, or that the same is found in any material respect to be defective, this would affect the *locus standi* of GSR to appear and a retrial would invariably have to be ordered.

[39] On the date fixed for continued submissions on 28 February 2019 however, learned counsel for the applicant took the stand through one of their counsel namely, Mr Harvinderjit Singh who said that they are now not disputing the existence of the LOA because he himself had had sight of it on a previous occasion.

[40] The fact that the impression initially given was that the stand of the applicant was as to the very existence of the LOA is also fortified from the manner in which the submissions of the respondent was couched as will become apparent hereinafter.

[41] It is for these reasons that this judgment will nevertheless at the outset address the issue of the very existence of the LOA.

[42] The respondent submitted that the appointment of GSR as a SDPP by the Public Prosecutor was made known through a media release by the Public Prosecutor dated 31 August 2018.

[43] This media release was exhibited as "DSN2" in the applicant's affidavit in support. The relevant part of the said media release is produced as follows:

> 5. … I am pleased to announce the appointment of Datuk Seri Gopal Sri Ram as Senior Deputy Public Prosecutor pursuant to Section 376(3) of the CPC.
>
> …
>
> Tommy Thomas
> Public Prosecutor
> 31st August 2018

[44] I am in agreement with the respondent that two facts emerge from this, firstly, it was expressly mentioned that the appointment of GSR as a SDPP was made under the provisions of s. 376(3) of the CPC and secondly, the appointment of GSR as SDPP was made by the Public Prosecutor personally.

[45] In this regard, a not dissimilar situation arose in the case of *Dato' Sri Mohd Najib bin Hj Abdul Razak v. PP* Criminal Application No. WA-44-194-11-2018 where it was held that the Public Prosecutor is not required to produce a copy of the letter of appointment of Datuk Haji Sulaiman bin Haji Abdullah as a prosecutor under s. 379 of the CPC.

[46] There, the High Court also found the appointment of Datuk Haji Sulaiman bin Haji Abdullah under s. 379 of the CPC was valid and the media release issued by the Attorney General would constitute sufficient notification about the appointment of an advocate as a DPP.

[47] The relevant part of the decision dated 22 January 2019 by Mohd Nazlan bin Mohd Ghazali J is reproduced as follows: A

[51] … *It was the AG Media Release which made public the appointment of Datuk Haji Sulaiman under Section 379 of the CPC. The AG Media Release had already specified the statutory basis for the appointment of Datuk Haji Sulaiman. But the instant application said nothing about any possible defects on the legal basis of the appointment or non-qualification of Datuk Haji Sulaiman under the statutory provision, other than questioning the issue of locus arising purely from the non-production.* B

[52] *Further, if the complaint was only to have sight of the instrument of appointment, I fail to appreciate why the AG Media Release could not be accepted by the applicant as providing the requisite and definitive confirmation of the same.* C

[53] Crucially, unlike the cases, some of which were referred to earlier, where a challenge was made as to the authority of the person having conduct of the prosecution, in the instant case, the situation was completely different since *the Public Prosecutor himself, the one and only person in this country constitutionally empowered to make the decisions on institution and conduct of prosecution and also the one having the authority to make the appointment under Section 379 of the CPC has made it official and public the fact of the appointment of Datuk Haji Sulaiman.* The AG Media Release also contained the reasons for the appointment and the choice of the Advocate. D

[54] … E

[55] *In my view there can therefore be no valid basis to challenge that a person having conduct of the prosecution does not have the authority or permission in writing of the Public Prosecutor because particularly in this instant case the AG Media Release dated 31 August 2018 had made it crystal clear that the Public Prosecutor has appointed Datuk Haji Sulaiman under Section 379 of the CPC to lead the prosecution in this case.* F

[56] I must also mention that the AG Media Release was issued by the Attorney General Chambers and stated in the AG Media Release to be the statement of the Public Prosecutor himself. A copy of the AG Media Release was introduced in this proceedings by way of an Exhibit to the very affidavit of the applicant himself which was affirmed on 23 November 2018 in support of this application. There are no averments in any of the affidavits of the applicant that could be construed as challenging the authenticity or even the contents of the AG Media Release. Any protest expressed at the hearing by the lead counsel for the applicant against reliance on the AG Media Release cannot be therefore be characterised by any other thing being somewhat spurious. G H

[57] The AG Media Release does not of course constitute the requisite fiat under section 379 of the CPC. The instrument of the letter of permission is undoubtedly the one, but crucially, not less than the appointing authority, namely the Public Prosecutor has made it publicly known by way of an official public announcement in the AG Media Release that he has made the appointment for the purpose and under the legal provision as stated in the AG Media Release. I

A [58] In contrast, in the cases referred to by the applicant where the production of the instrument of appointment was ordered by the Court, the challenge was made given the suspicion on the lack of authority of the person having conduct of the prosecution in the sense that there were doubts whether the persons who appeared to prosecute (other than Deputy Public Prosecutors) actually were authorised by the Public
B Prosecutor.

[59] But in the instant case *the Public Prosecutor had pre-empted any possible doubts by stating in the AG Media Release that the person in question had been appointed by him under the law as specified. This alone, unlike the other cases, would have been more than sufficient to notify everyone, the applicant included, that*
C *the person in question did have the authorisation granted by the Public Prosecutor.*

[60] …

[61] Indeed, if similar press release were to be issued in situations where non-DPPs appeared in Court, there would be absolutely no basis for an Applicant or his counsel to doubt the existence of the requisite
D authorisation. Most if not all of these other cases are obviously without the benefit of any official public announcement by the Public Prosecutor as to the status of the appointments. (emphasis added)

[48] Although the said judgment of Mohd Nazlan bin Mohd Ghazali J is currently under appeal, until and unless the decision is overturned in respect
E of this particular point, it affords useful guidance in the present situation.

[49] I agree therefore with the respondent's submission that the Public Prosecutor's media release is *ex facie* proof of the appointment of Sri Ram as a SDPP.

F **[50]** It is further not in dispute that on 13 September 2018, when criminal proceedings were commenced against the applicant's legal counsel, Tan Sri Shafee, *vide* Kuala Lumpur Sessions Court Arrest Case No. WA-62R-43-09-2018, a copy of GSR's fiat and/or instrument of appointment was requested by counsel.

G **[51]** On that occasion, the assisting Deputy Public Prosecutor, Ahmad Akram Gharib, handed to Tan Sri Shafee's counsel an original copy of the LOA executed by the respondent appointing GSR under s. 376(3) of the CPC.

[52] Subsequently, Messrs Shafee & Co's wrote two letters to the
H respondent dated 18 September 2018 and 26 September 2018 respectively which elicited the following response from the respondent dated 1 October 2018, *albeit* at the second time of asking:

2. In the Malaysian adversarial system, Tan Sri Muhammad Shafee bin Md. Abdullah ("the Accused") has no right to have a copy of the letter
I of appointment that the Public Prosecutor issued to Datuk Seri Gopal Sri Ram to lead the prosecution against the Accused.

> 3. In any event, the fact of its existence cannot be in doubt since it was shown to counsel for the Accused as stated in your letter dated 26 September 2018.

[53] Paragraph no. 3 of the respondent's letter of 1 October 2018 is particularly telling. It means that by their own admission, the applicant has confirmed that they have had sight of the LOA during the course of previous proceedings.

[54] One other aspect of the applicant having had sight of the LOA and then requesting for its production by way of letters is that by conduct they have implicitly acknowledged the existence of the LOA.

[55] For the applicant to now take the position that the very existence of the LOA is in doubt is to allow them to approbate and to reprobate. The principle was explained in *16 Halsbury's Law of England* (4th edn) para 1507 as follows:

> Approbation and reprobation. On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel *in pais*. The principle that a person may not approbate and reprobate expresses two proposition: (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile; and (2) that he will not be granted, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

[56] So the applicant cannot now resile from their previous position and contend that the LOA does not exist. By virtue of this, the fact of the appointment of GSR by the respondent under s. 376(3) of the CPC as reflected in the LOA cannot therefore be in any doubt.

[57] As far as the allegation by the applicant that GSR had stated in response to a request to produce the LOA "we will give, we will give", the respondent has replied to this by submitting that according to their notes and the notes of proceedings by the court that what GSR had in fact said was "we'll deal with it". As such I need not say more on this.

[58] Coming now to the argument that the respondent is required to produce the LOA because there is now a challenge taken, it is apposite to refer to the provisions of s. 376(3) of the CPC itself which reads:

A 376. Public Prosecutor

(1) …

(2) …

(3) The Public Prosecutor may appoint fit and proper persons to be Deputy
B Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor by or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally and he may designate any of such Deputy Public Prosecutors as Senior Deputy Public
C Prosecutors.

[59] What emerges from a plain and literal reading of the sub-section is that firstly, it does not stipulate that such appointment has to be in writing and secondly, it does not state that such appointment must be produced upon demand.

D

[60] For that matter and in response to another issue raised by the applicant, the sub-section contains no requirement for the appointment to be gazetted.

[61] In addition, the court may by virtue of s. 114(e) of the Evidence Act
E 1950 reproduced herein below, take cognisance of the fact that the LOA was duly issued.

114. Court may presume existence of certain fact

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events,
F human conduct, and public and private business, in their relation to the facts of the particular case.

ILLUSTRATIONS

The court may presume-

G (a) ...

(b) ...

(c) ...

(d) ...

H (e) that judicial and official acts have been regularly performed

[62] By virtue of s. 2 of the Evidence Act 1950, the Act applies to all judicial proceedings in or before any court of which undoubtedly the current proceedings are part of.

I

[63] To accede to the submission of the applicant that the LOA under s. 376(3) of the CPC must be produced and gazetted would mean this court reading into the sub-section something which is not there.

[64] This would run counter to the sentiments expressed by the apex court in the case of *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914 which held:

> ... it is not for the Courts to create procedural requirements because it is not the function of the Courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then the Courts should consider whether, on the facts, there has been non-compliance.

[65] To further reinforce the position that the applicant has no right to the production of the LOA, it is useful to refer to what was said in *PP v. Lew Koy* [2002] 1 CLJ 86; [2001] 4 MLJ 655 where the High Court at p. 96 (CLJ); p. 666 (MLJ) of the judgment held:

> On the issue of the written authority from the Public Prosecutor pursuant to Section 377(b) of the CPC, this Court is of the view that the written authority need not be tendered or filed in Court but is only required to show to the Court if ever there is any challenge that the Prosecuting Officer who is having conduct of the prosecution did not have the authority in writing of the Public Prosecutor to appear in Court and conduct the proceedings. In such a situation, the Prosecuting Officer is only required to show to the Court that he has been issued with the written authority by the Public Prosecutor or the Deputy Public Prosecutor and it need not be tendered as an exhibit or filed in Court as it is not a document shown to a witness and referred to by him in his evidence or by an affidavit.

[66] This case makes clear that if at all there is any doubt as to the existence of authority of the prosecutor, which this is not the case here for the reasons given above, the duty is only to supply it for the inspection of the court alone.

[67] It is evident that no less than the person of the AG himself appeared in these proceedings and said that the said GSR was appointed by him pursuant to s. 376(3) of the CPC.

[68] The appointing authority himself therefore has confirmed the appointment of GSR before this court. This court therefore under all the circumstances takes cognisance of the fact of the said appointment. It follows that there is no need for the LOA to be produced even for the inspection of this court because there is simply no cause or reason to doubt the existence or the legality of the appointment.

[69] It is also to be noted that the purpose or reason of requiring such production of the LOA has also not been made manifest in the NOM other than to state that the non-production may impact upon the *locus standi* of GSR and might result in the trial being held eventually to be a nullity.

[70] This is especially telling in light of the stand taken by the applicant that they are not challenging the justiciability of the AG to appoint GSR under s. 376(3) of the CPC before this court. If there is no challenge that the appointment was invalid or illegal in any manner, then what constitutes the basis of the challenge?

[71] As I said earlier, the applicant had initially appeared to challenge the very existence of the LOA. Subsequently however, the reason was expressed to be that they have a legitimate expectation to have the LOA shown to them as an extension of the aspect of fairness.

[72] Learned counsel then in the same breadth also submitted that the reason for requesting the production of the LOA was to examine the scope of the appointment.

[73] As far as the submission in respect of legitimate expectation is concerned, this is a concept commonly utilised in judicial review proceedings. To drive home the point, the case submitted by the applicant in support of the legitimate expectation point namely, *Food Corporation of India v. Kamdhenu Cattle Feed Industries* AIR 1993 SC 1601 is a case involving public law.

[74] No authority was produced or cited by counsel to show that the concept of legitimate expectation applies in respect of criminal proceedings. It is for that very reason also that the observations made by the learned High Court Judge in (Kuala Lumpur High Court Application for Judicial Review No. WA-25-393-12-2018) is of no relevance here besides the fact that such observations are not binding on this court in any event.

[75] As far as the contention that the reason for requesting the production of the LOA was to examine the scope of the appointment is concerned, in light of the fact that the legitimacy of the appointment is not in dispute and the AG has himself stated in this court that GSR was appointed pursuant to s. 376(3) of the CPC, it can be taken that GSR has the imprimatur of the AG to prosecute these cases. This fact itself would place any lingering doubts as to the *locus standi* of GSR to appear to prosecute these cases beyond doubt.

[76] Besides all of the reasons stated, is no less the fact that it has been submitted by the respondent that the LOA is classified as an official secret or marked as "RAHSIA" under the Official Secrets Act 1972 (Act 88).

[77] This fact was averred to by GSR in his counter affidavit no.1 affirmed on 15 January 2019 where he stated that his letter of appointment has been marked as "RAHSIA". A

[78] Besides this, the AG himself had submitted before this court that the LOA is a confidential document. Learned counsel for the applicant himself, Mr Harvinderjit Singh had candidly admitted that the document he had sighted was marked "RAHSIA". B

[79] I also tend to agree with the submission of the learned AG that by way of analogy to the solicitor and client privilege with regard to private practitioners contained in s. 126 of the Evidence Act 1950, the prosecution as matter of pure public policy considerations in the pursuance of their duty to prosecute crime cannot be placed in a worse off position that those in private practice. C

[80] The inevitable conclusion therefore is that the applicant has no right to request for a copy of the LOA executed by the respondent in relation to the appointment of GSR as a SDPP under s. 376(3) of the CPC to be produced. I also find for the reasons given that GSR has been clothed with the necessary *locus standi* to prosecute the cases. D

[81] The relief sought for in prayer 1 to encl. (1) is therefore dismissed.

(ii) Whether GSR Ought To Be Disqualified From Continuing To Act As SDPP And/Or To Appear On Behalf Of The Public Prosecutor In The Cases E

Inherent Jurisdiction Of The Court

[82] The applicant prays in aid the court's inherent jurisdiction and submits that the powers of the court to disqualify a prosecutor remains intact notwithstanding the powers of the Public Prosecutor under art. 145(3) of the Federal Constitution to "institute, conduct or discontinue any proceedings". F

[83] It is also submitted by the applicant that the powers to disqualify a person from acting is within the ambit of "judicial power" arising from the court's status as recognised in art. 121(1) of the Federal Constitution. G

[84] The respondent on the other hand, submitted that the court has no inherent jurisdiction apart from what is expressly provided in the CPC and the provisions of the CPC are therefore exhaustive.

[85] This argument however ignores s. 4 of the CPC which states: H

> Nothing in this Code shall be construed as derogating from the powers or jurisdiction of the High Court

[86] The inherent jurisdiction of the High Court to try cases arises from s. 22 of the Courts of Judicature Act 1964 which is housed under Part II of the said Act dealing with the original jurisdiction of the High Court. I

[87] Implicit in such powers is the jurisdiction of the High Court to regulate its proceedings and this must necessarily include the power to disqualify counsel from appearing for any party upon good reason.

[88] This power was described in *Grimwade v. Meagher and Ors* [1995] 1 VR 446 as follows:

> *It is within the inherent jurisdiction of a superior court to deny the right of audience to counsel when the interests of justice so require by reason of conflict or otherwise.* This power does not depend on the rules of professional conduct made by the legal profession and is not limited to cases where the rules are breached. The issue here is not whether or not the rule was breached, or whether the solicitor worked for the government. Nor is it solely whether the patient lost confidence in the process. *The issue is whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice required the removal of the solicitor. ... The public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the general public*
>
> *... The goal is not just to protect the interests of the individual litigant but even more importantly to protect public confidence in the administration of justice ...*
>
> In my view it cannot be doubted that *this court likewise has an inherent jurisdiction to ensure the due administration of justice and to protect the integrity of the judicial process and as part of that jurisdiction, in an appropriate case, to prevent a member of counsel appearing for a particular party in order that justice should not only be done but manifestly and undoubtedly be seen to be done.* (emphasis added)

[89] The inherent jurisdiction of the court has also been recognised by a body of local case law. In *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1, it was held:

> [36] What then is the meaning of inherent jurisdiction? According to the *Concise Oxford Dictionary*, "inherent" means "existing in something, esp. as a permanent or characteristic attribute." In the context of the law, that *inherent jurisdiction is deemed to be part of the court's power to do all things reasonably necessary to ensure fair administration of justice within its jurisdiction subject to valid existing laws including the Constitution.* In other words, that inherent power is found within the very nature of a court of law, unlike power conferred by statute.
>
> [37] The *Halsbury's Laws of England*, 4th edn in vol 37 at para 12 refers to "inherent jurisdiction" as follows:
>
> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, *in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.*

[38] In *Bremer Vulkan v. South India Shipping* [1981] 1 All ER 289 at 295, Lord Diplock speaking on the subject of dismissing a pending action for one of prosecution said:

The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an 'inherent power' the exercise of which is within the 'inherent jurisdiction' of the High Court. *It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice.* (emphasis added)

[90] In *Ahmad Zubair Hj Murshid v. PP* [2014] 9 CLJ 289; [2014] 6 MLJ 831, the apex court also recognised the scope of the inherent powers of a criminal court to safeguard an accused person as follows:

Lord Morris of Borth-Y-Gest said:

There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

The power (which is inherent in a courts jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice. (emphasis added)

[91] The case of *PP v. Datuk Harun Hj Idris & Ors* [1976] 1 LNS 180; [1976] 2 MLJ 116, also held:

'Conduct' in art. 145(3) cannot but refer to the conduct of prosecutions in court, as it indeed appears *ipsissimis verbis* in s. 377 of the CPC. *And 'control and direction' in s. 376(i) of the CPC is in respect of all criminal prosecutions and proceedings, and not of criminal procedure or the jurisdiction of the courts.*

'Conduct' of criminal prosecutions and proceedings in art. 145(3) cannot connote the regulation of criminal procedure or of the jurisdiction of the courts or the power or discretion to do so. Any contrary contention would in effect in my view be tantamount to the suggestion of the Public Prosecutor arrogating to himself the legislative powers vested in Parliament under item 4 and in particular para (b) there in List I (Federal List) in the Ninth Schedule to the Constitution, with perhaps also the not inconceptible resultant intrusion or at least a more than peripheral incursion into the sphere of art. 121(1) of the Constitution which provides that the judicial power of the Federation is vested in two High Courts and in such inferior courts as may be provided by federal law – namely, the Subordinate Courts Act 1948 which specifies the subordinate courts and their respective civil and criminal jurisdiction.

A Pursuing its signification, *'to conduct' means 'to lead, guide, manage'* (*Re Bhupalli Malliah* 1959 AIR AP 477; *Pride of Derby v. British Celanese Ltd* [1953] 1 Ch 149 at p 167, per Lord Evershed MR). *It conveys the idea of leading and guiding, that is to say, the person who conducts the prosecution determines all important questions of policy involved in the course of the trial and the attitude to be adopted by the prosecution towards material objections raised or* B *demands made by the accused with respect to the evidence.* (emphasis added)

[92] The case of *Public Prosecutor v. Dato' Yap Peng* [1987] 1 LNS 28; [1987] 2 MLJ 311 also made it clear that any attempt to encroach into the judicial power of the Federation will not be countenanced.

C **[93]** Besides this, the following excerpts from the Court of Appeal and the Federal Court respectively have also recognised that the power of the court to disqualify a prosecutor from acting were not curtailed merely because a person was appointed under s. 376(3) of the CPC.

[94] In *PP v. Dato Seri' Anwar bin Ibrahim* [2014] 1 CLJ 354; [2014] 1 MLJ D 633, counsel acting for the Public Prosecutor was sought to be disqualified *inter alia* on the basis that he was a material witness namely, that he was in conflict of interest.

[95] The Court of Appeal held in dealing with the point as follows:

E [30] We have no hesitation in accepting the principles stated in above cases. Having perused through the cases we find that whether a case of conflict of interest in a given case is made out would depend on the facts and circumstances of each case. What we note in each of the cases above the involvement by the counsel were seen obvious and we have no doubt that they would have compromised the administration of justice.

F **[96]** The Federal Court in *Dato Seri' Anwar Ibrahim v. PP* [2014] 1 CLJ 289; [2014] 1 MLJ 317 also found that there was power to disqualify a prosecutor except that the threshold had not been met on the facts:

Thus, the issue that he may be a potential witness at the trial that could give rise to a conflict of interest is a non-issue. Secondly, whether a case G of conflict of interest in a given case is made out would depend on the facts and circumstances of each case. On the facts and circumstances of this case, we are of the view that no case had been made out to prevent Tan Sri Shafee from acting as a deputy public prosecutor in the appeal on the ground of conflict of interest. We see no reason to nullify the appointment of Tan Sri Shafee as the deputy public prosecutor to H represent the public prosecutor in this proceeding.

[97] The Federal Court in *Dato Seri' Anwar Ibrahim v. PP* [2016] 6 CLJ 161; [2016] 3 MLJ 277 held:

I

> On the allegation of conflict of interest against Tan Sri Muhammad Shafee Abdullah on his appointment the Federal Court in their decision found Tan Sri Muhammad Shafee to be a fit and proper person to be appointed under s. 376(3) of the CPC as no evidence was tendered by the applicant to prove that there was such a conflict of interest.

[98] That this court is vested with the inherent jurisdiction to regulate its proceedings and this includes disqualifying a party from appearing for good reason is therefore not in dispute.

[99] The only issue here therefore is whether on the material placed before it, the court finds any reason to disqualify GSR from continuing to act as SDPP and/or to appear on behalf of the Public Prosecutor in the cases.

[100] The applicant submitted that the test used to disqualify a party is that pronounced in the case of *Kallinicos v. Hunt* [2005] NSWSC 1181, as follows:

> The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice

[101] The applicant submitted that GSR ought to be disqualified because he is in a position of conflict of interest. There are two aspects to this, firstly, because GSR was involved in investigations in the cases, he cannot also prosecute and secondly, GSR has already taken a position on the culpability of the applicant.

GSR Involved In Investigations

[102] These allegations arise from the following media release by the AG made on 31 August 2018 as follows:

> Datuk Seri Sri Ram, a retired Federal Court Judge, has returned to active practice. He has substantial experience in criminal law matters. His strong and determined personality will no doubt enhance the **investigation** and prosecution in all matters pertaining to the 1MDB scandal. (emphasis added)

[103] In an interview given by Tommy Thomas to The Edge and Malaysiakini on 13 September 2018 (transcripts of which published on the Attorney General's Chambers (AGC website), Tommy Thomas himself said:

> (i) Like for example, now you know, it's not a secret: the Shafee prosecution. The MACC team interviewed the witnesses. Sri Ram was involved in the final stages of **investigations**
>
> (ii) Sri Ram is to push 1MDB and perhaps argue in Court for 2 of those cases. Sri Ram will handle the prosecution of Shafee and probably the first of the 1MDB cases. (emphasis added)

[104] The emphasis made by the applicant is on the particular aspects of the statements attributed to the AG in respect of GSR's involvement in investigation.

[105] Firstly, it is a fact as much as it is common knowledge that investigative powers are vested in the Royal Malaysian Police ("PDRM") in respect of offences under the Penal Code, the Malaysian Anti-Corruption Commission ("MACC") for offences involving corruption under the Malaysian Anti-Corruption Commission Act 2009 and the Securities Commission for offences committed under the Securities Commission Malaysia Act 1993 to name but just a few.

[106] This is in fact acknowledged in the applicant's own submissions. It is also the practice that once these investigative agencies have concluded their investigations, then and only then will the investigation papers proceed to the Attorney General's Chambers for a decision to be taken on whether to institute charges.

[107] The role of the Deputy Public Prosecutors therefore as the alter ego of the AG only comes into play after the process of investigation is completed.

[108] Secondly, it is inconceivable that GSR had "gone to the ground" so to speak and commenced the recording of statements from potential witnesses. If this were indeed the case then there is the risk of him being called as a witness and that would place him in a position of conflict.

[109] Given the fact that GSR was not involved in investigations, there would also be no breach of r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 as contended by the applicant.

[110] There is therefore no evidence that GSR was involved in the investigations of the cases. It is also common knowledge that the re-investigations, after the previous AG decided to close the investigations in 2016, commenced post the 14th General Elections, in the month of May 2018 while the appointment of GSR as SDDP was in August of 2018.

[111] By then some three months or so had elapsed. The investigative agencies would already have been actively involved in the re-investigations. This makes it highly improbable that GSR had a hand in the investigation into the cases.

[112] Further, GSR himself had credibly denied the allegations by way of his affidavit as follows:

> (a) I respectfully state that I have been duly and in accordance with the law appointed by the Public Prosecutor to appear on his behalf and conduct the prosecution against the accused Najib at the trial that is set to commence on 15.4.2019;

(b) to the best of my knowledge and belief, the investigations into the criminal activities of the accused Najib and his counsel, Muhammad Shafee Abdullah (the accused Shafee) were carried out professionally by investigating officers of the MACC;

(c) I deny that I have acted in conflict of interest. The averments in paragraphs 49 and 50 which allege that I have direction and supervision over the investigation process is false. I have not at any time exceeded my role as a prosecutor.

[113] There is no material here to suggest that GSR was in any way involved in the recording of statements from witnesses or the accused for that matter. I find no material therefore to find that GSR was involved in the investigation of the cases.

GSR Has Already Taken A Position On The Culpability Of The Applicant

[114] This submission of the applicant is based upon the following cases in which GSR was or are involved:

(a) GSR acted as lead defence counsel for Anwar Ibrahim in the appeals in sodomy II before the Court of Appeal and Federal Court. One of the defences raised was that the entire prosecution of Anwar Ibrahim was politically motivated and was a political conspiracy. To fortify this references were made to alleged meetings between the complainant, and the applicant and submissions were made that the complaint against Anwar was concocted after these meetings;

(b) GSR acts for Anwar Ibrahim in Court of Appeal Civil Appeal No. W-01(A)-413-11-2017 which is a civil appeal brought against the Government of Malaysia. The crux of this matter is the allegation that the applicant had paid Tan Sri Shafee RM9.5M to prosecute the appeals in sodomy II. Consequent to this, Anwar Ibrahim seeks a declaration that his convictions were *ultra vires* to art. 5 of the Federal Constitution and were void, invalid and ineffective;

(c) In 2017, GSR acted for Zaid Ibrahim in a motion for leave to the Federal Court relating to an application to judicially review the Attorney General's decision not to prosecute the applicant. The press reported that during the course of the hearing, GSR argued that the threshold for leave to judicially review had been met as there was in fact a prior charge sheet drawn up against the applicant.

[115] Thus, the applicant submitted that it is clear that GSR has himself taken positions on the culpability of the applicant. Because of this, the applicant argued that objective perception clearly is against GSR being objective or dispassionate in the matter relating to the applicant's alleged conduct.

[116] It was argued that authorities emphasise that conflict justifying a disqualification need not be 'actual' but is sufficient if it is 'perceived'.

[117] The applicant relied on *inter alia*, the case of *Grimwade v. Meagher and Ors (supra)* where the first defendant was retained to prosecute the plaintiff in relation to alleged criminal offences. Thereafter, the first defendant appeared as senior counsel for the claimants in a related civil proceeding. A challenge was made on the first respondent's continued appearance. The court there held:

> *The objective test to be applied in the context of this case is whether a fair minded reasonably informed member of the public would conclude that the proper administration of justice required counsel be so prevented from acting …*
>
> *The plaintiff further submitted that the fair-minded and informed observer would apprehend a real risk that the first defendant would, albeit unintentionally, lack the objectivity required of counsel in order to perform his duty to his client and to the court.* It is readily apparent that, in the unique, extraordinary and highly exceptional circumstances of this case, any member of counsel in the shoes of the first defendant, no matter how vigilant and self-controlled, might unconsciously or subconsciously succumb to the temptation to seek to use the said action as a vehicle to justify his conduct of the prosecution or to answer criticisms made in respect thereof and to attack the plaintiff or *might be unable to properly distinguish between such personal interests and his duty to his clients.*
>
> Those unique, extraordinary and exceptional circumstances include the history of the matter and the various details of it which I have already recited … *These matters of themselves would in my view cause a fair-minded observer to apprehend a real risk that the first defendant would be unable to appear in the said action and act with that objectivity and detachment which the court expects of counsel appearing before it and a real risk that the first defendant would be unable to properly distinguish or avoid a conflict between his personal interests and his duty to his clients in the said action* (emphasis added)

[118] The argument canvassed by the applicant ignores two points. The first is what is commonly referred to as the cab-rank rule. This simply means that advocates are bound to accept a brief in any court in which they practise at a proper professional fee unless special circumstances justify a refusal to accept an individual case.

[119] This concept has been part of our system of operation at the Bar for a long time now. The rule means that a client cannot be restricted as to whom he chooses to appoint. A necessary corollary of that is of course the concomitant obligation of counsel to accept whatever briefs come his way subject to certain recognised exceptions.

[120] The fact therefore that GSR acted in the cases cited above does not in any way mean that this affected his professional ability to conduct those cases in an objective and impartial manner.

[121] Indeed, it is the function of the prosecutor to prosecute an accused person with the objective of securing a conviction as much as it is the duty of counsel defending an accused to secure his acquittal.

[122] This obligation is of course always circumscribed by the need to achieve this in a fair manner and not by any means fair or foul. Related to this is of course the fact that both for the prosecutor and defence counsel, their ultimate duty as officers of the court is first and foremost to the court.

[123] This in practical terms to use just one example would mean that they are to disclose to the court any document or matter or authority that assists the court in coming to a decision even though such disclosure may adversely affect their case.

[124] This brings me to the second point which is the duty, obligation and indeed the ability of the trial court to control its own proceedings.

[125] The applicant fears that he will be denied a fair trial as enshrined in art. 5 of the Federal Constitution because of what he anticipates will be overzealous prosecution by GSR given his bias and partiality.

[126] Learned counsel for the applicant submitted that the ability of the courts to regulate proceedings including the admission or rejection of evidence is circumscribed by the *bona fides* of the prosecutor in placing all manner of evidence before the court.

[127] Should the prosecutor decide not to disclose evidence favourable to the defence, there is nothing the court can do. He contrasts this with the case where a prosecutor is appointed to argue an appeal for then there would not arise any opportunity to withhold evidence as the appeal is based purely on the appeal records before the court.

[128] The prosecutors' duty to prosecute however is balanced with the duty upon him or her to call all witnesses essential to the unfolding of their case. The failure to do so will result in the invoking of the adverse presumption against them under s. 114(g) of the Evidence Act 1950.

[129] The applicant recognises the extent of the prosecutorial discretion as evident from the excerpt of their submissions as follows:

> (a) by extension of the Public Prosecutor's powers under Article 145 of the Federal Constitution, prosecutors have the power to institute, conduct and discontinue prosecutions. This is a discretionary power, by and large insulated from the check and balance of judicial review;

A (b) it is for the Prosecutor to decide what evidence to disclose to the Defence in accordance with section 51A of the Criminal Procedure Code. The Prosecutor faces no real obstacle in further admitting "surprise" documents as trial progresses, by virtue of section 51A(3);

(c) the Prosecutor is not legally obliged to disclose documents which
B are favourable to the Accused. This is entirely a matter of the Prosecutor's discretion; and

(d) the Prosecutor is similarly protected from the disclosure of statements which are exculpatory to the Accused;

(e) the Prosecutor is also free to pick and choose which witnesses they
C choose to call, so long as they are able to meet the bare requirement of unfolding the Prosecution narrative. This is also entirely a matter of the Prosecutor's discretion.

[130] Further, it must also be remembered that by virtue of s. 51A of the CPC, the prosecution is obliged to furnish certain documents which they
D intend to rely upon at the trial including a statement of facts favourable to the accused person.

[131] Learned counsel will no doubt retort that there is nothing to prevent the prosecution from withholding such documents and spring a surprise during the course of the trial.

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[132] The answer to that is the court can either refuse to accept the document as a sanction against the offending party or to accept the document with defence counsel being given the liberty to re-call witnesses in order to address whatever new issues that may arise out of the production of that document.

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[133] Then, there is s. 51 of the CPC which the defence can utilise for the production of certain documents if they meet the thresholds enunciated by established case law.

[134] At the risk of repetition, the prosecution lays itself open to the adverse
G inference under s. 114(g) of the Evidence Act 1950 to their own detriment should they choose not to tender a particular document or call a particular witness with the objective of supressing evidence.

[135] So, the defence is not altogether without recourse and there are safeguards inbuilt within the scheme of the CPC coupled with the court's
H inherent jurisdiction which the court can utilise to ensure a level playing field among parties.

[136] Further, a perusal of s. 376(3) of the CPC indicates that the appointed Deputy Public Prosecutors shall be under the general control and direction of the Public Prosecutor.

I

[137] The SDPP is not at liberty to prosecute in whatever fashion or manner they see fit untrammelled. Section 376(3) of the CPC does not provide a *carte blanche* to the SDPP to do as he pleases with respect to the manner of conducting prosecutions, the AG having at all times the ultimate control.

[138] This of itself would mean that the apprehension of the applicant with regard to GSR's alleged bias and impartiality is unfounded.

[139] The applicant next submitted that GSR is biased and impartial because he had made certain statements that exhibit that he had already taken a position on the applicant's culpability.

[140] This is based upon the fact that on 20 September 2018, when the 1MDB case commenced, GSR in an unprecedented fashion opposed the grant of any bail. This was completely inappropriate as the applicant obviously did not pose a flight risk and had in fact been cooperating fully with the MACC. The applicant had also had an unblemished role in Government since 1982.

[141] In opposing bail GSR made clear insinuations that the applicant was already guilty of the offences charged for and was also guilty of other offences.

[142] The applicant reproduced an excerpt of GSR's submissions as recorded in the notes of proceedings as follows:

> Conduct of the accused described by the Attorney General of the United States as the worst case of kleptocracy in the world. In simple language, this is a case of theft of unparalleled proportions. And the fact that the elected head of state is facing charges for that crime is a matter of national disgrace. It has made Malaysia famous for all the wrong reasons. I have been informed by the present Deputy Chief Commissioner of Head of the MACC that in 2017, the accused interfered with the investigation of this very case.
>
> …
>
> What we are saying is there is material in our collection that shows that the accused has the propensity to interfere with on-going investigations.

[143] The applicant also submitted that in dealing with proposed conditions of bail, GSR proposed conditions which were unprecedented in a case not involving the death sentence.

[144] The material excerpt from the notes of proceedings shows as follows:

> The point we want to make is we want a condition imposed that the accused is prohibited from issuing public statements relating to the 1MDB or associated in support of the request we make the application we make to the Court. We refer to the case of Datuk Balwant Singh, where Justice Augustine Paul. … the Accused is not to be present in any open public space, or to attend any public functions, save for religious and family activities. We ask for the same condition to be imposed on the accused. That is all.

[145] The applicant further refers to an excerpt made by GSR as follows:

> It is a matter of notoriety that the accused Najib interfered with investigations against him by removing the then Attorney General, Tan Sri Abdul Gani Patail and several members of the MACC and in directing the arrest of a Deputy Public Prosecutor with the MACC. As a Senior Deputy Public Prosecutor, it was my duty to draw the Court's attention to the fact that the accused Najib had interfered with investigations against him as this is a relevant consideration in the grant or refusal of bail.

[146] These remarks were made during the bail application by the applicant. In this regard, I agree that the prosecution is entitled as a matter of prosecutorial right to raise the objection as to the bail for the court's consideration as the charges were in respect of non-bailable offences.

[147] Indeed, it is the duty of the prosecutor to object to bail in appropriate cases and when they do, they are entitled to raise any matters they consider relevant or bring any matter to the attention of the court which may affect the bail application.

[148] Ultimately, whether to grant bail or otherwise is a matter in the discretion of the court having regard to all matters placed before it no matter how overzealous an objection to bail might be perceived.

[149] In the final analysis, bail was given subject to conditions and this was a pure exercise of the court's discretion as opposed to anything else. In that respect, it is also telling that learned counsel for the respondent submitted that GSR had not objected to the applicant's application to pay the bail amount by way of instalments. This surely does not reflect the behaviour of someone predisposed to overzealous prosecution influenced by bias.

[150] The applicant also cited the Australian case of *MG v. R* [2007] NSWCCA 57 where an accused was ordered to be re-tried on allegations of sexual assault. A Margaret Cunneen was appointed as Crown Prosecutor for the retrial. Margaret had prior to the appointment made a public statement saying *inter alia* "I commend the quality of the police investigation and the fortitude of the victim". The Supreme Court of New South Wales held that it was inappropriate for Margaret to continue acting as a prosecutor in the case. The court held:

> The statements which Ms Cunneen made have a number of consequences. They demonstrate a lack of detachment from the case she was required to prosecute. There is no difficulty in Ms Cunneen privately holding the view that the applicant is guilty. However, her public expression of that view displayed partiality and potentially compromised her capacity to fairly prosecute on behalf of the Crown. It had the consequence that a fair minded person might reasonably conclude that

her conduct of the prosecution would be directed to vindicating her publicly expressed view. When a prosecutor on a public occasion expresses the view that a person is guilty, although they have not been tried according to law, the later prosecution of that person by that prosecutor tends toward oppression which is the antithesis of a fair trial.

… As we have outlined a crown prosecutor is afforded a unique role in a criminal trial. He or she has the carriage of the Crown case and has the responsibility of making decisions as to the evidence which is placed before the court. Unlike some other jurisdictions, and in particular, the inquisitorial system a judge has little if any role to play in the evidence produced at the trial see *R v. Apostilides* (1984) 154 CLR 563.

… It requires consideration of whether a reasonably informed fair minded person would conclude that, if prosecuted by Ms Cunneen, the trial of the applicant would be fair. In our opinion, because of her public statements that person would inevitably conclude that she may not discharge her obligations with appropriate fairness and detachment. Accordingly, in the unusual circumstances of this case if Ms Cunneen were to prosecute the applicant's trial, justice would not be seen to be done.

[151] The first thing to note here is that the prosecutor in that case made a public statement as opposed to the instant case where the statements attributed to GSR were made during the course of his duty as SDPP in court in objecting to the bail application by the applicant. Whatever other comments were made in an affidavit and not to the media.

[152] Secondly, the effects of such a statement made in public by the prosecutor would undoubtedly have run a risk of jurors or potential jurors involved being influenced. These concerns are unfounded in our jurisdiction.

[153] It is also to be noted that unlike career Deputy Public Prosecutors who may well have every reason to successfully prosecute the applicant with a view to being promoted as a result, GSR has no similar interest or pecuniary interest for that matter and so can be expected to perform his duty without fear or favour.

[154] The apprehension or fears of overzealous prosecution on the part of the applicant is based upon mere speculation as opposed to actual prosecutorial misconduct.

[155] Upon a consideration of all the facts, I do not find any basis for there to arise even an appearance of bias on the part of GSR that would lead a reasonable person to conclude that the applicant would not be accorded a fair trial. The threshold for the disqualification of GSR was therefore not met.

[156] With regard to the allegation of perjury levelled against GSR, these are mere allegations unsupported by any evidence or material as they have not been proven in any court of law nor has GSR been found guilty of perjury.

[157] Under all circumstances, I therefore find no grounds upon which GSR can be said to be biased or impartial in the conduct of his duty as SDPP against the applicant.

[158] In the premises, this application is dismissed.

Stay Application

[159] Learned counsel for the applicant applied for a stay of the trial dates fixed as they intend to file an appeal against the decision to the Court of Appeal. It was submitted that should a stay be refused and the appeal eventually allowed it would render whatever proceedings nugatory and this constituted special circumstances.

[160] Learned counsel for the respondent on the other hand submitted that there were no special circumstances to justify a stay and in any event, there would be enough time between now and the appeal to the Court of Appeal to be disposed of.

[161] I agree that there is sufficient time between now and the trial dates commencing 15 April 2019 for the appeal process to be exhausted. I therefore dismissed the application for stay.